SERVED: June 29, 2007

NTSB Order No. EA-5297

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 27th day of June, 2007

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. MICHAEL A. LIOTTA, Respondent.	Docket SE-17542

OPINION AND ORDER

Respondent appeals the written initial decision of Administrative Law Judge Patrick G. Geraghty, served in this proceeding on April 5, 2006.[1] By that decision, the law judge affirmed the suspension of respondent's mechanic certificate with airframe and powerplant ratings, but reduced the sanction from 45 to 30 days. The law judge had previously granted, in part, the Administrator's motion for summary judgment. The law judge also

[1] A copy of the law judge's order is attached.

denied respondent's affirmative defense.[2] The parties and the law judge then held a telephone conference; respondent indicated he did not contest the remaining allegations and the parties agreed to handle the sanction issue with briefs alone. Following the submission of briefs, the law judge issued his decisional order, which is the subject of respondent's appeal. We deny respondent's appeal.

Background

The Administrator served her suspension order on August 31, 2005, based on alleged violations of the Federal Aviation Regulations (FARs), 14 C.F.R. § 43.13(a) and (b).[3] Respondent appealed the Administrator's suspension order, and the Administrator subsequently filed the suspension order as her complaint. Respondent's answer admitted four of the seven allegations that the complaint contained, but asserted an affirmative defense that the Administrator should not have

[2] A copy of the law judge's March 6, 2006 order granting, in part, the motion for summary judgment and denying respondent's affirmative defense is attached.

[3] Section 43.13(a) requires a mechanic performing maintenance, alteration, or preventive maintenance on an aircraft, engine, propeller, or appliance to "use the methods, techniques, and practices prescribed in the current manufacturer's maintenance manual or Instructions for Continued Airworthiness prepared by its manufacturer, or other methods, techniques, and practices acceptable to the Administrator...."

Section 43.13(b) requires the mechanic maintaining, altering, or performing preventive maintenance on such aircraft or components to complete the work in such a manner and use materials of such a quality that the condition of the aircraft and/or components will be "at least equal to its original or properly altered condition...."

suspended his certificate because respondent complied with the provisions of Advisory Circular (AC) 00-58 (Voluntary Disclosure Reporting Program). Respondent argues that his purported compliance with this program obviates the need for a sanction.

Because respondent's answer to the complaint and his responses to a request for admissions established the violations in the complaint, the Administrator moved for summary judgment; she also posited that the Board did not have jurisdiction to consider the self-imposed limitation on her own prosecutorial discretion with regard to the maintenance individual involved in this matter.[4] The Administrator further argued that, even if the law judge determined the Board had jurisdiction to review the Administrator's discretion to pursue an enforcement action, the Board should defer to the Administrator's construction and application of the AC and conclude, in any event, that respondent would not qualify for the program.

Facts

In March 2005, respondent replaced the tachometer generator on a Fairchild SA-227 turboprop aircraft. The Fairchild Maintenance Manual requires removal of the hydraulic pump for access when replacing the tachometer generator, and requires re-

[4] The Administrator's brief, which urges the Board to uphold her choice of sanction, cites cases in which we previously held that the Board does not have jurisdiction to review the decision to pursue an enforcement action. Such cases include Administrator v. Eden, NTSB Order No. EA-4595 (1997); Administrator v. Adcock, NTSB Order No. EA-4507 (1996); Administrator v. Bailey and Avila, NTSB Order No. EA-4294 (1994); Administrator v. Heidenberger, NTSB Order No. EA-3759 (1993); Administrator v. Renner, NTSB Order No. EA-3927 (1993).

installation of the hydraulic pump after performing maintenance on the tachometer generator; the maintenance manual also includes the approved procedures for removing a hydraulic engine-driven pump. When reinstalling the hydraulic engine-driven pump, the maintenance manual requires the hose by-pass fitting to be torqued to 40 to 65 inch pounds, the pressure fitting to 75 to 125 inch pounds, and the suction fitting to 150 to 250 inch pounds. The maintenance manual also indicates that a mechanic's proper reinstallation of the hydraulic pump lines requires the use of a torque wrench.

Respondent conceded that he did not perform an engine run after he completed the maintenance on the tachometer generator and that he signed the aircraft's maintenance log indicating he, "[r]emoved/replaced E1 tach generator IAW Fairchild MM Chapter 77-10-10," and the aircraft was returned to service. Response to Request for Admissions, ¶¶ 11 and 14. The next day, due to a loss of hydraulic pressure, the operator aborted a scheduled flight of the aircraft, returning the aircraft to the ramp after taxiing for takeoff.

Respondent subsequently appropriately tightened the pump fittings. After completing that work, respondent signed the maintenance log in response to this maintenance discrepancy, and wrote that the aircraft "[l]ost hydraulic pressure on taxi" and that he, "retightened both hydraulic lines on E1 hydraulic pump. Serviced system per MM chapter 12. Leak and pressure checked system. Found OK." Response to Request for Admissions, ¶ 17.

Respondent's employer, Key Lime Air (Key Lime), notified the FAA of this incident by telephone within 24 hours, and followed up with a letter to the FAA on March 9, 2005. Key Lime concluded the causes of the incident were complacency and a lack of concise maintenance policies as to secondary maintenance.

Key Lime disclosed the incident in accordance with the provisions of AC 00-58, with the expectation that the voluntary self-disclosure would shield Key Lime, and perhaps its employees, from an FAA regulatory enforcement action. The FAA did not take action against Key Lime, and, after further investigation, withdrew a proposed certificate action against the Key Lime inspector who signed off respondent's work. The FAA chose to pursue a regulatory enforcement action against respondent.

Law and Discussion

The Board has long held that it will not review the Administrator's election to pursue a matter through legal enforcement action.[5] Therefore, based on this lack of jurisdiction, the Board cannot decide a case based on the Administrator's choice of pursuing an action against a particular individual, and not against others who may have played a role in the alleged violation. Respondent's argument that the Board should review the Administrator's choice of pursuing an action

[5] See Administrator v. Nixon, NTSB Order No. EA-4249 at 3 (1994); Administrator v. Heidenberger, NTSB Order No. EA-3759 at 3 (1993); Administrator v. Doll, 7 NTSB 1294, 1296-97 (1991); Administrator v. Cardozo, 7 NTSB 1186 (1991); Administrator v. Hunt, 5 NTSB 2314, 2316 (1987) (citing Section 609 of the Federal Aviation Act, codified at 49 U.S.C. § 1429).

against respondent in particular, but not against Key Lime or the inspector, is therefore unavailing. The cases that respondent cites[6] supporting his argument that the Board possesses the authority or jurisdiction to review such elections by the Administrator are inapposite, as they relate to the sanction the Administrator sought to impose, rather than the Administrator's discretion to pursue an enforcement action in the first place.

Considering respondent's affirmative defense, we look first to AC 00-58 and see that it does not apply to the subject violations of 14 C.F.R. part 43. The AC states that it, "provides information and guidance material that may be used by a certificate holder, an indirect air carrier, a foreign air carrier ... or a production approval holder (PAH) ... when voluntarily disclosing to the [FAA] apparent violations of [14 FAR parts are listed; part 43 is not one of them]." AC 00-58, ¶¶ 1.a. and 3.[7] These provisions pertain to entities, companies, or carriers, not to individuals. The AC outlines a practice of foregoing enforcement actions, "for covered instances of noncompliance that are voluntarily disclosed to the FAA." See id. at ¶ 6.

The AC does extend its immunity provisions, in limited circumstances, to individual airmen or to other agents of an

[6] See Administrator v. Randall, 3 NTSB 3624 (1981); Administrator v. Distad, NTSB Order No. EA-3947 (1993).

[7] AC 00-58 was reissued on September 8, 2006; the version in effect at all times pertinent hereto was dated May 4, 1998. Nothing in the revised AC affects our decision in this case.

employing covered entity, but only when four criteria are met: (1) when the violation involves a deficiency of the employer's practices or procedures; (2) when the individual inadvertently violates FAA regulations as a direct result of that deficiency; (3) when the individual or other agent immediately reports the violation to the employer; and (4) when the employer immediately notifies the FAA of the violation. Id. at ¶ 13.a. (1)-(4).

Even if respondent "self-disclosed," it would appear he could not meet his burden of showing: (1) that the "apparent violation involves a deficiency of the employing entity's practices or procedures"; (2) that he violated the regulations "as a direct result" of any such deficiency of the employing entity; or (3) that respondent or another agent, "immediately [made] the report of [his] apparent violation to the employing entity." See id. The only one of the four criteria that respondent focused on was the one that requires immediate notification to the FAA, but all criteria must be met, not just the one.

We note that respondent could also have used, had he chosen to do so, the Aviation Safety Reporting Program (ASRP), AC 00-46D. That program could have extended immunity-type protection. The ASRP, "invite[s] ... maintenance personnel ... to report to NASA ... discrepancies and deficiencies involving the safety of aviation operations." FAA AC 00-46D, para. 1. But even its provisions have exceptions, stating that, "[w]hen violation of the FAR comes to the attention of the FAA from a source other

than a report filed with NASA[8] under the ASRS,[9] appropriate action will be taken"—referring to the FAA's enforcement action policy. See id., para 5.

Just as in AC 00-58, respondent would have the burden under the ASRP of showing that four qualifying criteria applied: (1) that the violation was inadvertent and not deliberate; (2) that it did not involve a criminal offense, or an accident, or an action disclosing his lack of qualification or competency; (3) that, for a period of 5 years prior to the date of the current alleged violation, he had not been found to have committed a violation of any aviation programs under Subtitle VII of Title 49 of the U.S. Code; and (4) that he completed and delivered a written report of the incident to NASA under that program. Id. at paragraph 9. If respondent wanted to maximize his opportunity for immunity from sanction for his violations, he should have filed a report under the ASRP. He did not do so; therefore, he certainly fails, at a minimum, to meet the fourth requirement. Therefore, ASRP's protections are not now available to him. Whether he would have met the other three criteria is moot, because all four must be established.

As for respondent's attempt to qualify for "immunity" under the self-disclosure provisions of AC 00-58, we note that the development of the facts in this record is meager, owing to factors including the lack of an evidentiary hearing. We would

[8] Under the ASRP, the self-disclosure report is made through NASA.

caution respondents to be attentive to the development of the record in such a situation, when the burden of establishing an affirmative defense rests on the respondent.

Based on the intended application of the policy of AC 00-58, as set forth on its face, the record before us would not indicate that its provisions apply to respondent or to his violations. Key Lime investigated and reported respondent's violation, and determined that the cause of the incident was, "a lack of concise maintenance policies regarding the documentation of secondary maintenance actions taken to facilitate the work being done...." The Administrator alleged that respondent violated 14 C.F.R. § 43.13(a) and (b), which require mechanics to follow the manufacturer's maintenance manual and, basically, to return the aircraft to a serviceable condition. Respondent's FAR violations were not a result, either directly or indirectly, of a deficiency in Key Lime's maintenance policies, if deficiencies actually existed. Furthermore, were we to conclude that Key Lime had no deficiency at all, Key Lime could not protect employees by claiming responsibility for some deficiency in an effort to bring an employee under its "immunity umbrella."

Conclusion

Respondent violated 14 C.F.R. § 43.13(a) and (b), because he did not adhere to the maintenance manual, which has approved procedures for replacing the tachometer generator, including

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(..continued)
[9] Aviation Safety Reporting System.

removing the hydraulic pump in order to access and replace the tachometer generator, and then reinstalling the hydraulic pump. The maintenance manual gives the torque values for the various fittings on the hydraulic pump in order to accomplish the reinstallation properly. In the case before us, after replacing the tachometer generator, respondent failed to retighten the fittings on the hydraulic pump to the proper torque.

Respondent's conduct is a failure to adhere to the proper methods, techniques, and practices prescribed in the maintenance manual, as 14 C.F.R. § 43.13(a) requires. After the maintenance, the aircraft was not, "at least equal to its original or properly altered condition," as § 43.13(b) requires. These violations were not related to any deficiency in Key Lime's policy regarding documentation of secondary maintenance. While Key Lime's review of its policies and procedures is commendable, and we encourage this practice, respondent has an independent duty to comply with the manufacturer's maintenance manual; his failure to do so constitutes a violation of 14 C.F.R. § 43.13(a) and (b), as the Administrator alleges.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The 30-day suspension of respondent's mechanic

certificate shall begin 30 days after the service date indicated on this opinion and order.[10]

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

[10] For purposes of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).